83 - 1787

Office - Supreme Court, U.S.
FILED
APR 27 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

DEBORAH ROBINSON and JAMES ROBINSON, her husband,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 83-5437

Petition for Writ of Certiorari and Appendix

Of Counsel:
Irving M. Portnoy
Richard J. Schubert

S. DAVID LITMAN, ESQUIRE
LITMAN LITMAN HARRIS PORTNOY, AND BROWN, P.A.
1701 Grant Building
Pittsburgh, PA 15219
(412) 456-2000

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURTS BELOW ERR IN DISMISSING PETITIONERS' CIVIL ACTION AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT BY FINDING AS A MATTER OF LAW THAT APPELLANTS FAILED TO PERFECT A TIMELY ADMINISTRATIVE CLAIM PRIOR TO THE INSTITUTION OF THEIR CIVIL ACTION IN THE DISTRICT COURT?

II. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER WHETHER THE POSTAL SERVICE USED FRAUD, MISREPRESENTATION, AND OVERREACHING TACTICS IN SETTLING APPELLANTS' CLAIM FOR PROPERTY DAMAGE SO THAT THE GOVERNMENT SHOULD BE ESTOPPED FROM ASSERTING THE SUFFICIENCY OF PETITIONERS' ORIGINAL CLAIM FORM?

III. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER WHETHER THE FIRST CLAIM FILED BY PETITIONERS CONSTITUTED A VALID CLAIM UNDER 28 U.S.C.A. §2671 IN THAT THE ORIGINAL CLAIM FORM GAVE THE DISTRICT COURT SUBJECT MATTER JURISDICTION OVER THE HUSBAND-PETITIONER'S CLAIM FOR DAMAGES FOR PERSONAL INJURIES?

IV. SHOULD PETITIONERS BE DENIED RECOVERY FOR DAMAGES FOR PERSONAL INJURY ON THE BASIS OF AN ALLEGED TECHNICAL DEFECT IN THEIR CLAIM FORMS?

V. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER PETITIONERS' CONTENTIONS THAT THE FAILURE OF THE POSTAL SERVICE TO EVALUATE AND INFORM APPELLANTS OF THE SUFFICIENCY OF THEIR CLAIM WITHIN SIX MONTHS OF ITS SUBMISSION CONSTITUTED A DENIAL OF THAT CLAIM FOR PURPOSES OF 28 U.S.C.A. §2676(a)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS OF THE COURTS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Basis For Federal Jurisdiction In District Court 3

B. Statement of Facts 3

REASONS FOR GRANTING THE WRIT 6

I. Did the Courts Below Err in Dismissing Petitioners' Civil Action Against the United States Under the Federal Tort Claims Act by Finding as a Matter of Law that Petitioners Failed to Perfect a Timely Administrative Claim Prior to the Institution of Their Civil Action in the District Court? 6

II. Did the Courts Below Err in Failing to Consider Whether the Postal Service Used Fraud, Misrepresentation, and Over-reaching Tactics in Settling Petitioners' Claim for Property Damage so that the Government Should be Estopped from Asserting the Sufficiency of Petitioners' Original Claim Form? 7

Page

III. Did the Courts Below Err in Failing to Consider Whether the First Claim Filed by Petitioners Constituted a Valid Claim Under 28 U.S.C.A. §2671 in that the Original Claim Form Gave the District Court Subject Matter Jurisdiction Over the Husband-Petitioner's Claim for Damages for Personal Injuries? 11

IV. Should Petitioners be Denied Recovery for Damages for Personal Injury on the Basis of an Alleged Technical Defect in their Claim Forms? 12

V. Did the Courts Below Err in Failing to Consider Petitioners' Contentions that the Failure of the Postal Service to Evaluate and Inform Petitioners of the Sufficiency of Their Claim Within Six Months of its Submission Constituted a Denial of that Claim for Purposes of 28 U.S.C.A. §2676(a)? 16

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Adams v. United States, 615 F.2d 284 (5th Cir. 1980) 12, 16

Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971) 12, 17

Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1980) 11

Community Health Services v. Califano, 698 F.2d 615 (3d Cir. 1983) 9,10

Console Express, Inc. v. New York Shipping Ass'n., 602 F.2d 494 (3d Cir. 1979) 8

Corniel-Rodriguez v. I.N.S., 532 F.2d 301 (2d Cir. 1976) 9

Founding Church of Scientology of Washington D.C. v. Director, Federal Bureau of Investigation, 459 F. Supp. 748 (D.C. 1978) 16, 17

Gallimore v. United States, 530 F. Supp. 136 (E.D. Pa. 1982) 15

Kanab Services, Inc. v. Federal Savings & Loan Insurance Corp., 650 F.2d 78 (5th Cir. 1981) 8

Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982) 9

Schwieker v. Hansen, 450 U.S. 785 (1981) 9

Sky Harbor Air Service v. United States, 348 F. Supp. 594 (D. Neb. 1972) 15

Page

Tucker v. United States Postal Service, 676 F.2d 954 (3d Cir. 1982) 16

Union Mutual Insurance Company v. Wilkinson, 80 U.S. (13 Wall) 222 (1872) 8

Waslanovich v. United States, 335 F.2d 96 (3d Cir. 1964) 9

STATUTES AND OTHER AUTHORITIES

28 U.S.C. §2672 ..... 1, 3

28 U.S.C. §2675(a) 3, 15, 16, 17

S.Rep. No. 1327, 89th Cong., 2d Sess. 5-6, reprinted in [1966] U.S. Code Cong. & Admin. News pp. 1215, 1216 12

Williston on Contracts §1536 (3d Ed. 1970) 8

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

The Petitioners, Deborah and James Robinson, respectfully pray that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 30, 1984.

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the United States Court of Appeals for the Third Circuit. The Judgment Order entered by the United States Court of Appeals for the Third Circuit, as well as the Memorandum Opinion and Order filed by the United States District Court for the Western District of Pennsylvania, dated May 24, 1983, appear in the Appendix hereto.

JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit was dated and entered on January 30, 1984. This Petition for Certiorari is filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.

§2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the

negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction in District Court.

This is an action brought against the United States of America pursuant to the Tort Claims Procedure of the Federal Tort Claims Act, Sections 2672 and 2675(a) of Title 28 of the United States Code. Jurisdiction was vested in the District Court pursuant to the provisions of the Federal Tort Claims Act.

B. Statement of the Facts

On March 3, 1981, a vehicle driven by Wife-Petitioner was involved in a collision with a vehicle owned by the U.S. Postal Service and driven by one of its employees. As a result of the collision, Petitioners' vehicle sustained extensive damage and Wife-Petitioner suffered various

personal injuries. After the accident, the Petitioners received from the United States Postal Service a Form 95 on which they were to submit their claims for damages. They were instructed by a postal inspector, O. Alfera, as to the manner in which they were to submit their claim. Petitioners were not represented by counsel at this time. Petitioners inquired of O. Alfera as to whether they could submit a claim for property damage immediately and file a later claim for personal injuries inasmuch as the extent of Wife-Petitioner's personal injuries could not be ascertained at that time because less than two weeks had elapsed from the date of the accident. O. Alfera assured Petitioners that such a procedure was permissible and Petitioners submitted a claim Form 95 on March 12, 1981 claiming $1,625.00 for property damage and no stated amount for personal injuries. This form was signed by both Petitioners.

Petitioners then received a letter and check, both dated March 19, 1981. The letter indicated that the check enclosed represented the full and final settlement of all of Petitioners' claims arising out of the collision of March 3, 1981. The check was in the amount of $1,625.00, the exact amount claimed by Petitioners as property damage. Upon receipt of this letter and check, Petitioners telephoned O. Alfera to inquire as to the status of their personal injury claim in light of the abovementioned letter. O. Alfera assured Petitioners that they could accept the check dated March 19, 1981 and subsequently file a claim for personal injuries. Petitioners, in reliance on these representations, accepted and cashed the check in the amount of $1,625.00.

Thereafter, Petitioners consulted S. Sanford Kantz, Esquire, a member of the Bar of the Commonwealth of Pennsylvania, for assistance in submitting their claim for personal injuries to the Postal Service. When Mr. Kantz

received the above history from Petitioners, he telephoned O. Alfera to ask whether the Postal Service would indeed honor Petitioners' personal injury claim in light of the letter of March 19, 1981. O. Alfera reiterated to Mr. Kantz the statements made to Petitioners regarding their personal injury claim. O. Alfera, in addition, sent to Mr. Kantz an additional claim Form 95 and invited him to submit a claim on Petitioners' behalf.

Subsequently, an additional Form 95 was submitted on Petitioners' behalf on September 29, 1981 claiming damages for personal injuries. Neither Petitioners nor their counsel received any communication from the Postal Service regarding the status of their claim by January 4, 1983. Petitioners' counsel wrote to inquire of O. Alfera as to the status of Petitioners' claim. In reply, Thomas R. Zurick, a postal inspector, wrote and invited Petitioners to file yet another claim Form 95.

On February 3, 1983, Appellants filed a Complaint in the United States District Court for the Western District of Pennsylvania alleging negligence on the part of the United States Postal Service and its employee in the occurrence of the above-mentioned motor vehicle collision. The United States of America filed a Motion to Dismiss Petitioners' Complaint pursuant to Federal Rules of Civil Procedure 12(B)(1), 12(B)(2), 12(B)(6), and 12(H)(3), along with an affidavit of Thomas R. Zurick, a postal inspector, alleging, *inter alia*, that Petitioners' action was barred because Petitioners had settled all of their claims by accepting payment for the property damage sustained by them, and that Petitioners failed to perfect a timely administrative claim under the FTCA.

On April 6, 1983, the Honorable Gerald J. Weber, District Judge for the Western District of Pennsylvania,

ordered that Respondent's Motion to Dismiss be treated as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 in light of Respondent's submission of evidentiary matters which were outside the pleadings. Both parties submitted briefs in support of their positions, and Petitioners submitted countervailing affidavits. Thereafter, Respondent submitted a reply brief and Judge Weber entered an Order on April 28, 1983 directing that his Order of April 6, 1983 was in error and that he would consider the Appellee's Motion as a Motion to Dismiss.

On June 24, 1983, Judge Weber entered a Memorandum Order and a Memorandum Opinion in which he dismissed Petitioners' action with prejudice. Petitioners filed a timely appeal to the United States Court of Appeals for the Third Circuit. The Third Circuit Court of Appeals chose to rule upon the merits of the case without oral argument and on January 30, 1984, entered a Judgment Order affirming the decision of Judge Weber in the District Court.

REASONS FOR GRANTING THE WRIT

I. DID THE COURTS BELOW ERR IN DISMISSING PETITIONERS' CIVIL ACTION AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT BY FINDING AS A MATTER OF LAW THAT PETITIONERS FAILED TO PERFECT A TIMELY ADMINISTRATIVE CLAIM PRIOR TO THE INSTITUTION OF THEIR CIVIL ACTION IN THE DISTRICT COURT?

In disposing of the present matter by way of Memorandum Opinion in the District Court and by Judgment Order in the Court of Appeals, the Courts below have

failed to adequately address several significant issues presented in this case, including fraud and overreaching on the part of the United States Government, the sufficiency of Petitioners' original claim form, and the obligation of a governmental agency to evaluate claims and notify claimants as to the sufficiency of those claims, without delay. Due to the gravity of the issues involved together with the lower courts' failure to adequately address them, Petitioners seek the instant relief.

II. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER WHETHER THE POSTAL SERVICE USED FRAUD, MISREPRESENTATION, AND OVERREACHING TACTICS IN SETTLING PETITIONERS' CLAIM FOR PROPERTY DAMAGE SO THAT THE GOVERNMENT SHOULD BE ESTOPPED FROM ASSERTING THE SUFFICIENCY OF PETITIONERS' ORIGINAL CLAIM FORM?

The courts below failed to discuss the initial claim form submitted by the Petitioners and its effect upon their subsequent personal injury claim. The Government argued below that the second claim form filed by Petitioners, even if complete and sufficient, would not have permitted them to maintain a personal injury action since Petitioners had already accepted a "settlement" from their first claim. At first blush, the Government's position seems to be sound. The circumstances surrounding the filing of both claim forms, however, especially the conduct of a Government agent, O. Alfera, reveal a disturbing account of the techniques employed by Respondent in "settling" Petitioners' claim.

Due to the allegations of fraud and misrepresentation on the part of the Government, Petitioners argued below

that the Government should be estopped from asserting the first "settlement" as a bar to their claim for personal injuries.

The doctrine of equitable estoppel has been described in the following manner:

> [W]here one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.

Union Mutual Insurance Co. v. Wilkinson, 80 U.S. (13 Wall) 222, 233 (1872). *See, generally*, 13 *Williston on Contracts* §1536 (3d. Ed. 1970). This doctrine has application to the factual circumstances involved in the instant action.

> It is recognized that under the doctrine of equitable estoppel a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligation or effects. (Citation omitted.) The Supreme Court extended this principle in *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) to include estoppel based on the acceptance of benefits of an administrative order or ruling.

Kanab Services, Inc. v. Federal Savings & Loan Insurance Corp., 650 F.2d 78, 81 (5th Cir. 1981).

The Third Circuit, in *Console Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), has adopted the elements of equitable estoppel as set forth by the Ninth Circuit in *United States v. Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1979). Those elements are:

(1) The party to be estopped must know the facts;

(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it so intended;

(3) The latter must be ignorant of the true facts; and

(4) He must rely on the former's conduct to his injury. (Citations omitted.)

In the past, Courts had been reluctant to apply the doctrine of equitable estoppel against the government for various reasons.[1] Recent case law, however, has revealed a trend towards the application of this doctrine in some circumstances. *See United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1968); *Waslanovich v. United States*, 335 F.2d 96 (3d Cir. 1964.) The Court's attention is invited to the recent Third Circuit opinion in *Community Health Services v. Califano*, 698 F.2d 615 (3rd Cir. 1983).[2] In that case, the Government sought to recoup payments received by a charitable health care provider under medicare cost reimbursement procedures, because the reimbursements were used by the provider for expenses which were not reimbursable. The Government sought this recoupment even though an agent of the Secretary of Health and Human Services, on five different occasions over a two and one-half year period, wrongly advised the health care provider that those expenses were reimbursable. The health care provider, in reliance upon those statements, made expenditures and incurred obligations in excess of $70,000.00.

---

[1]*See Schweiker v. Hansen*, 450 U.S. 785 (1981); *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982).

[2]*See also Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1980); *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301 (2d Cir. 1976).

The introductory paragraph of the *Califano* opinion, written by Judge Higginbotham, is especially appropriate in this case:

> Since time immemorial it has been argued that The King can do no wrong: "therefore, his subjects can neither complain of, nor be indemnified for, the wrongs" of the King nor for the wrongs of the King's agents. In a different context, we are now asked to affirm a somewhat similarly archaic concept in favor of the United States government, regardless of its effect on innocent persons.

698 F.2d at 616.

The attitude of the Courts, as seen in the *Califano* opinion, favors a more liberal and accommodating approach towards the invocation of equitable estoppel against the Government in certain circumstances. In the case at bar, it is clear that the Government is attempting to take advantage of the representations it made to the Petitioners at the time they filed their original claim. Respondent's agent, O. Alfera, knew that the procedures for filing administrative claims with the Postal Service required that Petitioners submit all claims for property damage and personal injuries on a single Form 95. Respondent's agent also knew that the Petitioners had suffered personal injuries as well as property damage. Nevertheless, O. Alfera counselled Petitioners to file their property damage claim without listing an amount for personal injuries while knowing full well that the Postal Service could settle the property damage claim for an insignificant amount and, at the same time, prevent Petitioners from seeking compensation for their personal injuries. In light of these actions on the part of the Government, Petitioners should be permitted to seek additional recovery by way of suit for their personal injuries.

Perhaps the crux of this appeal is best summarized by the Ninth Circuit Court of Appeals in *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970), when the Court stated:

> To say to these appellants, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great government.

427 F.2d at 57.

III. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER WHETHER THE FIRST CLAIM FILED BY PETITIONERS CONSTITUTED A VALID CLAIM UNDER 28 U.S.C.A. §2671 IN THAT THE ORIGINAL CLAIM FORM GAVE THE DISTRICT COURT SUBJECT MATTER JURISDICTION OVER THE HUSBAND-PETITIONER'S CLAIM FOR DAMAGES FOR PERSONAL INJURIES?

Since the Courts below based their decision in this case solely upon the adequacy and timeliness of the second claim form, several factual issues need to be resolved. One such issue involves the inclusion of Husband-Petitioner's claim in Wife-Petitioner's claim for damages for personal injuries. In the Courts below, the Government made much of the fact that Husband-Petitioner's signature did not appear on the second claim form submitted. The first claim form, however, contained both signatures. Surely, the Government was on notice of Husband-Petitioner's claim as a result of the first claim form. Once again, the Government is attempting to penalize these innocent citizens for the misrepresentations made by its own agent. At best, the claim form is a vehicle through which the procedural workings of the FTCA are instituted. Also, it has been stated that "the necessity for a signature to the claim is to fix responsibility for the claim and the representations

made therein." *Bialowas v. United States*, 443 F.2d 1047, 1050 (3rd Cir. 1971). Since the Government was on notice of Husband-Petitioner's claims, to now exclude him from pursuing his derivative claim because he did not notify the Government a second time would impose burdens upon him which were neither foreseen nor intended by the drafters of the FTCA.

IV. SHOULD PETITIONERS BE DENIED RECOVERY FOR DAMAGES FOR PERSONAL INJURY ON THE BASIS OF AN ALLEGED TECHNICAL DEFECT IN THEIR CLAIM FORMS?

In reviewing the instant appeal, this Court should superimpose the purpose of the FTCA, as expressed by the Congress of the United States, upon all of the facts and circumstances. In enacting the FTCA, Congress sought

> [T]o ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States.[3]

The more human and humane purpose of the Act can be seen in another part of the legislative history. That purpose is to:

> [provide] for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government.[4]

With regard to the Congressional intent expressed above, this appeal seeks the resolution of two questions. First,

---

[3]S. Rep. No. 1327, 89th Cong., 2d Sess. 6, reprinted in [1966] U.S. Code Cong. & Admin. News pp. 2515, 2516.

[4]S. Rep. at 5, reprinted in [1966] U.S. Code Cong. & Admin. News at pp. 1215, 1216. *See also, Adams v. U.S.*, 615 F.2d 284 (5th Cir. 1980).

would the Government suffer any prejudice whatsoever by permitting Petitioners to amend their original claim form to include a claim for damages for personal injuries in light of the fact that the Government was on notice that Petitioners had a personal injury claim at the time that they filed their original claim form? Second, has the United States suffered any prejudice whatsoever by the failure of Petitioners to state a sum certain for damages for personal injuries on their claim form where Petitioners' injuries and damages were permanent and ongoing at the time the claims were made, and where any statement of a sum certain would have been arbitrary and without true relation to the ultimate value of the case?

With regard to the first question, the Government should not be permitted now to claim prejudice as a result of their own affirmative misrepresentations. Not only were Petitioners not informed that the failure to include a sum certain in their original claim form would preclude them from recovering those damages in the future, they were specifically informed by a representative of the Respondent who had knowledge of the "true facts" that the Petitioners could file a separate claim for personal injuries. The Government was on notice of a claim which included not only a claim for property damage, but also a claim for personal injuries. Yet, the Government promptly settled the Petitioners' property damage claim in an attempt to circumvent the purpose of the Act and take advantage of these unwary claimants. In light of the misconduct of the Government in procuring Petitioners' incomplete original claim form, the Government must not now be heard to complain that a technical defect, the lack of a sum certain stated for personal injuries, deprives the Petitioners of their right to maintain a suit in the district court for personal injuries.

With regard to the second question, it is difficult to understand how claimants can conform to the purpose of the FTCA by submitting personal injury claims that are neither accurate nor realistic. At the time of the submission of both claim forms, Wife-Petitioner was undergoing continuing medical and dental treatment. At the time of the filing of the first form, Petitioners had no idea of the extent of their injuries or the expenses that they would incur in connection therewith. Since Wife-Petitioner had barely begun to receive treatment for her injuries, and she had no way of even estimating her losses. Rather than submit an unrealistic or fraudulent claim, she chose to leave the appropriate space blank until a later date. When Petitioners spoke with Mr. Alfera, they were told that the absence of a stated amount stated for personal injuries did not affect their claim, and that the absence did not hinder the administrative claims process in any respect.

Petitioners' circumstances were changed somewhat at the time of the submission of the second claim form. Even though Wife-Petitioner had received some treatment for her injuries, the true amount of Petitioners' claim was still unknown because Wife-Petitioner had received some treatment for her injuries, the true amount of Petitioners' claim was still unknown because Wife-Petitioner continued to treat her injuries for some time. When the second claim form was submitted, the Personal Injuries block was marked "undetermined." If anything, the Petitioners and their counsel should be labelled as honest. They did not wish to mislead the Government as to an amount claimed, nor did they wish to underestimate their own claim. Instead, Petitioners placed the Government on notice of a personal injury claim with the hope that a reasonable passage of time and a meaningful investigation by the Government would yield an acceptable result for all. It seems

apparent from the Government's action, or, more properly, inaction, that Petitioners' only avenue of relief was to pursue an action in the district court.

An argument that Petitioners could have included an arbitrary sum certain in their claim form and then seek an amendment if the damages increased would be clearly without foundation. In light of the case law in the area of amendments to amounts claimed in administrative proceedings, it is clear that such amendments are generally frowned upon by the Government and the courts, and such amendments are only permitted under pressing circumstances. *See* 28 U.S.C. §2675(a); *Gallimore v. United States*, 530 F. Supp. 136 (E. D. Pa. 1982). With this in mind, it would seem as if the Government forces injured claimants to play an administrative form of Russian roulette by stating a sum certain for damages for personal injuries when the nature of the injuries are ongoing. If a claim for injuries is not present on the claim form due to ongoing medical care and expense, the Government seeks dismissal for want of a sum certain, even though a fair amount cannot be ascertained before the running of the Statute of Limitations. If the claim form states an arbitrary amount, and the claimant later seeks to amend, the courts generally disallow the amendment and force the claimant into further litigation.

This frightening, yet real scenario is a far cry from the legislative purpose behind the Act to "ease court congestion and avoid unnecessary litigation" and to provide for "fair settlement" of tort claims. These Petitioners cry out for the protection that the Federal Tort Claims Act was originally designed to give, because the "Act was never intended as a trap for the unwary claimant." *Sky Harbor Air Service v. United States*, 348 F. Supp. 594, 596 (D. Neb. 1972).

V. DID THE COURTS BELOW ERR IN FAILING TO CONSIDER PETITIONERS' CONTENTIONS THAT THE FAILURE OF THE POSTAL SERVICE TO EVALUATE AND INFORM APPELLANTS OF THE SUFFICIENCY OF THEIR CLAIM WITHIN SIX MONTHS OF ITS SUBMISSION CONSTITUTED A DENIAL OF THAT CLAIM FOR PURPOSES OF 28 U.S.C.A. §2676(a)?

28 U.S.C. §2675(a) states, in pertinent part:

> The failure of an agency to make final disposition of a claim within six months after it is filed shall, *at the option of the claimant any time thereafter*, be deemed a final denial of the claim for purposes of this section 28 U.S.C. §2675(a). (Emphasis added.)

The Courts below determined that the failure of the Postal Service to act on Petitioners' second claim form within six (5) months of its submission did not operate as a denial of that claim under 28 U.S.C. §2675(a) due to the fact that a sum certain was not included, thus rendering the form incomplete. This analysis, however, totally absolves the Government from any duty to investigate and inform Petitioners within six (6) months that the claim form submitted by them was invalid and incomplete. Even though the burden is upon the Claimant to file a claim form, once the proper Governmental agency is notified of a claim, the burden then shifts to that agency to conduct a fair, prompt, and thorough investigation. *See Adams v. United States*, 615 F.2d 284 (5th Cir. 1980), *clarified*, 622 F.2d 197 (5th Cir. 1980); *Tucker v. United States Postal Service*, 676 F.2d 954 (3d Cir. 1982).

In *Founding Church of Scientology of Washington, D.C., Inc. v. Director, Federal Bureau of Investigation*, 459 F. Supp. 748 (D.C. 1978), the district court recognized the

significance of this argument when it determined, as a matter of fact, that the administrative agency involved had requested additional information within six months of the submission of the claim in order to properly process the plaintiff's claim.

In this matter, Petitioners filed their second claim form on September 29, 1981. They received *no* correspondence from the Postal Service regarding the alleged inadequacies of the claim form, (*See, Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971)) or requesting further information which would enable the Postal Service to properly process Appellants' claim (*See, Founding Church of Scientology of Washington, D.C., Inc. v. Director, Federal Bureau of Investigation*, 459 F. Supp. 748 (D.C. 1970)) until Appellants' counsel requested information on the status of their claim on January 4, 1983. To sustain the decision of the lower court in this matter and condone the Government's inaction for *sixteen months* on Appellants claim form would render the clear language of 28 U.S.C. §2675(a) totally meaningless. According to that provision, a government agency must take action on a claim within six months of the time it is submitted or, at the option of the claimant, such inaction may be treated as a final denial of that claim and the claimant is free to institute an action in the district court.

CONCLUSION

For all of the reasons described above, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

LITMAN LITMAN
HARRIS PORTNOY
AND BROWN, P.A.

By .....
S. DAVID LITMAN

1701 Grant Building
Pittsburgh, PA 15219
(412) 456-2000

ATTORNEYS FOR PETITIONERS

In the
Supreme Court of the United States

October Term, 1984

DEBORAH ROBINSON and JAMES ROBINSON,
her husband,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 83-5437

Appendix to Petition For Writ of Certiorari

Of Counsel:
Irving M. Portnoy
Richard J. Schubert

S. DAVID LITMAN, ESQUIRE
LITMAN LITMAN HARRIS
PORTNOY, AND BROWN, P.A.
1701 Grant Building
Pittsburgh, PA 15219
(412) 456-2000

TABLE OF CONTENTS

Page

Memorandum Order of the United States District Court for the Western District of Pennsylvania (Weber, J.), dated April 28, 1983 ..... 2a

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania (Weber, J.), dated May 24, 1983 ..... 4a

Order of Court of the United States District Court for the Western District of Pennsylvania (Weber, J.), dated May 24, 1983 ..... 7a

Judgment Order of the United States Court of Appeals for the Third Circuit dated January 30, 1984 ..... 8a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DEBORAH ROBINSON and
JAMES ROBINSON, her husband
Plaintiffs

v.

UNITED STATES OF AMERICA
Defendant

Civil Action
No. 83-253

MEMORANDUM ORDER

Plaintiffs instituted this Federal Tort claims action to recover damages for personal injuries incurred in a collision with a Postal Service truck. The Government filed a Motion to Dismiss for failure to state a claim and for lack of subject jurisdiction. Because the Government filed evidentiary materials in support of what is titled, at least in part, a motion to dismiss under Fed.R.Civ.P. 12(b)(6) this court indicated the motion would be treated as a motion for summary judgment in accord with Federal rule 12(b) and 56.

After review of the Government's briefs and evidentiary materials, it is clear that the Government's motion, despite its title, is in all respects a motion to dismiss for lack of subject matter jurisdiction under Federal rule 12(b)(1). The submission of evidentiary materials in support of a Federal Rule 12(b)(1) motion to dismiss does not convert the motion to one for summary judgment under Fed.R.Civ.P. 56.

However, evidentiary materials may properly be considered in connection with a Federal rule 12(b)(1) motion to dismiss. *E.g. Attwell v. LaSalle National Bank*, 607 F.2d

1157 (5th Cir. 1979; *Pintozzi v. Scott*, 436 F.2d 375 (7th Cir. 1970); *Exchange National Bank of Chicago v. Touche, Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976); *McGinley v. Burroughs*, 407 F.Supp. 903 (E.D. Pa. 1975); *United Dairy Farmers Cooperative Assoc. v. Milk Control Commission of Commonwealth of Pa.*, 47 F.R.D. 1 (W.D.Pa. 1968). The matter will, therefore, be treated as a "speaking" motion to dismiss, rather than a motion for summary judgment.

Accordingly, out of an abundance of caution, we will permit the parties to submit any additional evidentiary material on the issues raised by the Government's motion on or before May 9, 1983.

SO ORDERED this 28th day of April, 1983.

/s/ GERALD J. WEBER
United States District Judge

cc: Irving Portnoy, Esq.
1704 Grant Building
Pittsburgh, PA 15219

J. Alan Johnson, United States Atty.
Att: Albert W. Schollaert, AUSA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DEBORAH ROBINSON and
JAMES ROBINSON, her husband
Plaintiffs

v.

UNITED STATES OF AMERICA
Defendant

Civil Action
No. 83-253

MEMORANDUM OPINION

WEBER, D. J. May 24, 1983

Plaintiffs have instituted this action under the Federal Tort Claims Act for injuries arising from a collision with a postal service truck. The government has moved to dismiss for lack of jurisdiction. We conclude that plaintiffs have failed to comply with the jurisdictional requirements of the Federal Tort Claims Act and the action must, therefore, be dismissed.

Plaintiffs initially filed an administrative claim, without the assistance of an attorney, for property damage arising from the accident. This claim was settled by the Postal Service for the amount requested. Subsequently, with the advice and assistance of counsel, plaintiffs filed a second adminstrative claim for personal injuries to Mrs. Robinson incurred in the accident. Under the heading "Amount of Claim", plaintiffs inserted "amount undertermined". this claim was filed September 29, 1981. A letter from counsel accompanying the claim contained assurance that documentation of losses would be forthcoming.

After some exchange of correspondence, the Postal Inspector informed counsel that deficiencies existed in the administrative claim. Specifically, counsel was informed that the claim must state money damages in a sum certain for personal injury, and that supporting documentation for those damages must be submitted. Rather than cure the deficiencies in the administrative claim, counsel then filed this lawsuit in February 1983.

Although the government's motion raises a variety of issues we find one gound in particular to be dispositive and, therefore, address only that one item. The government contends that the plaintiffs have not filed a proper administrative claim and therefore cannot comply with the jurisdictional prerequisites of the Federal Tort Claims Act.

The Federal Tort Claims Act requires any injured party to file an administrative claim for money damages for injury or loss of property as a prerequisite to filing suit on the claim. 28 U.S.C. §2675 (1966). A primary purpose of this provision is to permit the government to expedite a fair settlement of the claim presented. *e.g. Adams v. United States*, 615 F.2d 284 (5th Cir. 1980).

In furtherance of this purpose, federal regulations require a claim to state a "sum certain". 28 C.F.R. §14.2; 39 C.F.R. §912.5(a). Plaintiffs in the instant case failed to state a sum certain for personal injuries. Upon receipt of a letter from the Postal Inspector informing them of the sum certain requirement plaintiffs filed the instant action rather than remedy the defects in their administrative claim.

An administrative claim form that fails to state a sum certain for money damages does not constitute a proper claim. *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971); *Driggers v. United States*, 309 F.Supp. 1377 (D. S.C. 1970); *Gunstream v. United States*, 307 F.Supp. 366 (C.D. Cal. 1969). In short, the papers filed by the plaintiffs with

the Postal Service are insufficient to constitute a claim. Without the inclusion of a sum certain, the government is unable to determine what officer has responsibility for settlement and is hindered in determining what is an equitable settlement. Consequently, the failure to submit a proper and/or timely administrative claim deprives this court of jurisdiction over the matter. *Bialowas*, 433 F.2d 1047.

Plaintiffs seek to excuse the failure to submit a proper claim by pleading the ignorance of the claimants. This argument has no merit because plaintiffs were represented by counsel at the time they filed the administrative claim for personal injuries. Plaintiffs also seek refuge in that section of 28 U.S.C. §2675 which provides that a claimant, at his election, may file suit on his claim without receiving a denial by the government agency if that agency has not acted on the administrative claim within six months after its filing. It is argued then that plaintiffs' claim is properly filed in this court because the government failed to request the statement of a sum certain until more than six months had passed from the filing of the administrative claim. The argument fails, however, because the six month period for government action is counted from the filing of a proper administrative claim. As described above, plaintiffs' claim is improper and insufficient to permit intelligent government action. The provision which plaintiffs rely on is, therefore, inapplicable.

For the reasons stated above the government's motion to dismiss will be granted and plaintiffs' complaint dismissed with prejudice. The government has also raised a waiver and release argument but because of our determination on this issue, we do not address those other matters.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DEBORAH ROBINSON and
JAMES ROBINSON, her husband
Plaintiffs

v.

UNITED STATES OF AMERICA
Defendant

Civil Action
No. 83-253

ORDER

AND NOW, this 24th day of May 1983, in accordance with the foregoing Memorandum Opinion, it is ORDERED that defendant's motion to dismiss is GRANTED, and plaintiffs' action is hereby DISMISSED with prejudice.

/s/ GERALD J. WEBER
United States District Judge

cc: Irving Portnoy, Esq.
Litman, Litman, Harris & Portnoy, P.A.
1704 Grant Building
Pittsburgh, PA 15219

J. Alan Johnson, United States Atty.
Att: Albert W. Schollaert, AUSA
633 U.S. Courthouse
Pittsburgh, PA 15219

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 83-5437

DEBORAH ROBINSON and JAMES ROBINSON,
her husband

Appellants

vs.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(C.a. No. 83-00253)
(Honorable Gerald J. Weber)

Submitted Under Third Circuit Rule 12(6)
January 24, 1984

Before: ADAMS, GARTH, *Circuit Judges,*
*and BROTMAN, District Judge**

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT

/s/ GARTH M. ADAMS
Circuit Judge

ATTEST:

/s/ SALLY MRVOS

Sally Mvros, Clerk

DATED: January 30, 1984

*Hon. Stanley S. Brotman, United States District Court for the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on February 21, 1984.

Test: /s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Costs taxes in favor of the United States of America as follows:

Briefs	$222.00
Covers	$ 24.00
TOTAL	$246.00

END OF DOCKET